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DEFAMATION OF A PUBLIC OFFICIAL: THE NEW YORK TIMES CASE IN PERSPECTIVE

On March 9, 1964, the United States Supreme Court decided the case of *New York Times v. Sullivan*,¹ holding that the first amendment protected libelous statements concerning "public officials," even misstatements of fact, absent a showing of "actual malice." In so doing, the Court has disjointed the holdings of some thirty-six jurisdictions and has, to a considerable extent, subjected the common law of libel to federal standards.

The purpose of this comment is to examine and reconsider the law of libel, concentrating on that area affected by the relatively recent holding of the Supreme Court. Secondly, the holding of the Court will be analyzed and studied for the underlying importance which it represents, concentrating also on the recurring problems that the broad language of the decision has conceived. The main objective is to pinpoint and to predict the future effects of the decision. And lastly, to illustrate the effect of this decision upon those state constitutions requiring truth coupled with good motives and justifiable ends; as the only defense to libel actions; specifically, the Illinois Constitution, article II, section 4.

It should be noted, however, that despite the fact that the *Times* decision has been implemented to include actions for criminal libel, this comment has not attempted to cover that area, but rather has been limited to a discussion of civil libel.

LIBEL AND ITS DEFENSES

Implicit in any discussion of the law of libel is the understanding that when one person communicates matter tending to hold another up to hatred, contempt or ridicule, or causing him to be shunned by his fellows, the party being defamed has a cause of action against his defamer. Instead of attempting to cover all the imaginable communications giving rise to such a right, suffice it to say that matter tending to injure one in his reputation, or depriving him of his respect or esteem, will allow plaintiff an opportunity to recover.²

At common law, the mandatory elements of the libel action were three; falsehood, malice and injury. In some instances, the communication amounted to libel *per se*, that is, the matter published was held to be libelous on its face without the aid of inducement, innuendo, or col-

¹ 376 U.S. 254 (1964).

² For a comprehensive study of the varied accusations giving rise to the action of libel see PROSSER, *TORTS* (3rd ed. 1964); BOWER, *ACTIONABLE DEFAMATION* (2d ed. 1923); SALMOND, *TORTS* (8th ed. 1934); Wettach, *Recent Developments in Newspaper Libel*, 13 MINN. L. REV. 21 (1928).

loquium.³ Being libel *per se*, the law presumed the necessary elements, including damages, from the character of the publication alone. However, in the majority of jurisdictions where extrinsic facts are necessary to make out the defamatory meaning conveyed, such statements are considered merely libelous *per quod*, actionable only on proof of special damages.⁴ On the other hand, if the imputation of the matter conveyed is capable of incorporation into one of the following categories, special damages need not be shown.⁵ The first of these categories is that in which there is a crime involving moral turpitude,⁶ subjecting the guilty party to an infamous punishment.⁷ It was not important that the charge imputed a

³ *Youssoupoff v. Metro-Goldwyn-Mayer Pictures*, 50 TLR 581, 99 ALR 864 (1934); *Cassidy v. Daily Mirror Newspapers*, 2 K.B. 331 (1929); *Thorley v. Lord Kerry*, 4 Taunt. 355, 128 Eng Rep 367 (1812); *Starks v. Comer*, 190 Ala. 245, 67 So. 440 (1914); *First Nat. Bank v. N. R. McFall & Co.*, 144 Ark. 149, 222 S.W. 40 (1920); *Lewis v. Hayes*, 177 Cal. 587, 171 Pac. 293 (1918); *Jones v. Register & Leader Co.*, 177 Iowa 144, 158 N.W. 571 (1916); *Godin v. Niebuhr*, 236 Mass. 350, 128 N.E. 406 (1920).

⁴ *Rose v. Indianapolis Newspapers*, 213 F.2d 227 (7th Cir. 1954); *Ilitzky v. Goodman*, 57 Ariz. 216, 112 P.2d 860 (1941); *Karrigan v. Valentine*, 184 Kan. 783, 339 P.2d 52 (1959); *Towles v. Travelers Ins. Co.*, 282 Ky. 147, 137 S.W. 2d 1110 (1940); *Langworthy v. Pulitzer Publ. Co.*, 368 S.W.2d 385 (Mo. 1963); *Chase v. New Mexico Publ. Co.*, 53 N.M. 145, 203 P.2d 594 (1949); *Becker v. Toulmin*, 165 Ohio St. 549, 138 N.E.2d 391 (1956); *Edwards v. Crane*, 292 P.2d 1034 (Okla. 1956); *Brown v. National Home Ins Co*, 239 S.Car 488, 123 S.E.2d 850 (1962).

⁵ *Caldwell v. Crowell-Collier Pub. Co.*, 161 F.2d 333 (5th Cir. 1947); *Broking v. Phoenix Newspapers*, 76 Ariz. 334, 264 P.2d 413 (1953); *Rachels v. Deener*, 182 Ark. 931, 33 S.W.2d 39 (1930); *Harrison v. Burger*, 212 Ala. 670, 103 So. 842 (1925); *Gustin v. Evening Press Co.*, 172 Mich. 311, 137 N.W. 674 (1912); *Foley v. Hoffman*, 188 Md. 273, 52 A.2d 476 (1947); *Creekmore v. Runnels*, 359 Mo. 1020, 224 S.W.2d 1007 (1949).

⁶ Conduct contrary to justice, honesty, modesty or good morals: *Marsh v. State Bar of California*, 210 Cal. 303, 291 Pac. 583 (1930). An act of baseness, depravity, or vileness in the private and social duties which a man owes to his fellow men, or to the public in general: *Sipp v. Coleman*, 179 Fed. 997 (D.N.J. 1910); *In re Henry*, 15 Idaho 755 (1909); *Amick v. Montross*, 206 Iowa 51 (1928); *Hughey v. Bradrick*, 39 Ohio App. 486, 177 N.E. 911 (1931); *Traders & General Ins Co. v. Russell*, 99 S.W.2d 1079 (Tex. Civ App. 1936).

⁷ Punishment by imprisonment in a state prison or penitentiary: *United States v. Moreland*, 258 U.S. 433 (1922); *Maxey v. United States*, 207 Fed. 327 (8th Cir. 1913); *Flanagan v. Jepson*, 177 Iowa 393, 158 N.W. 641 (1916); *Lee v. Stanfill*, 171 Ky 71, 186 S.W. 1196 (1916); *Hull v. Donze*, 164 La. 199, 113 So. 816 (1927). Punishment by death or imprisonment in a penitentiary: *Mackin v. United States*, 117 U.S. 348 (1886); *Earley v. Winn*, 129 Wis. 291, 109 N.W. 633 (1906). Requiring moral turpitude above: *Halley v. Gregg*, 74 Iowa 563, 38 N.W. 416 (1888); *Brown v. Nickerson*, 5 Gray (Mass.) 1 (1885); *Larson v. R. B. Wrigley Co.*, 183 Minn. 28, 235 N.W. 393 (1931); *Kelly v. Flaherty*, 16 R.I. 234, 14 Atl. 876 (1888). Requiring moral turpitude and infamous punishment: *Shan v. Killingsworth*, 213 Ala. 655, 106 So. 138 (1925); *Amick v. Montross*, 206 Iowa 51, 220 N.W. 51 (1928); *Woodville v. Pizatti*, 119 Miss. 85, 80 So. 491 (1919); *Cline v. Holdrege*, 122 Neb. 151, 239 N.W. 639 (1931); *Jones v. Brinkley*, 174 N.C. 23, 93 S.E. 372 (1917); *Barnett v. Phelps*, 97 Ore. 242, 191 Pac. 502 (1920).

crime already punished,⁸ or for which prosecution was barred,⁹ because social ostracism, not danger of criminal prosecution, was the basis for the exception.

The second category, wherein one is charged with having a loathsome disease, has as its basis of recovery the exclusion from society that would result. Historically, the exception was limited to charges of venereal disease¹⁰ or leprosy.¹¹ With the progress of medical science in reducing the number of incurable diseases, the exception no longer includes charges of insanity, tuberculosis, and the like, and is restricted to its original meaning.¹²

The third category consists of any charge that directly affects a person in his business, office, or means of support.¹³ But here the statement must be directly incompatible with the business or profession of the plaintiff,¹⁴ while a more general reflection upon his character, lacking this special significance, would not be sufficient.¹⁵

The last category deals with a charge involving the imputation of un-

⁸ *Wiley v. Campbell*, 21 Ky. 396 (1827); *Krebs v. Oliver*, 78 Mass 239 (1858); *Smith v. Stewart*, 5 Pa. 372 (1847).

⁹ *Stewart v. Howe*, 177 Ill 71 (1855) (infancy); *French v. Creath*, 1 Ill 31 (1820) (statute creating offense repealed); *Tenney v. Clement*, 10 N.H. 52 (1838) (person said to have been murdered alive); *Van Ankin v. Westfall*, 14 Johns (N.Y.) 233 (1817); *Brightman v. Davies*, 3 N.J. Misc 113, 127 Atl. 327 (1925).

¹⁰ *McDonald v. Nugent*, 122 Iowa 651, 98 N.W. 506 (1904); *Sally v. Brown*, 220 Ky. 576, 295 S.W. 890 (1927); *Williams v. Holdredge*, 22 Barb (N.Y.) 396 (1854); *Kaucher v. Blinn*, 29 Ohio St. 62 (1875); *Crittall v. Horner*, 80 Eng. Rep. 366 (1619).

¹¹ *Lewis v. Hayes*, 165 Cal. 527, 132 Pac. 1022 (1913); *Simpson v. Press Pub. Co.*, 33 Misc. 228, 67 N.Y.S. 401 (1900).

¹² *Rade v. Press Publ. Co.*, 37 Misc. 254, 75 N.Y.S. 298 (1902); *Kassowitz v. Sentinel Co.*, 226 Wisc. 468, 277 N.W. 177 (1938).

¹³ *Daherty v. Lynett*, 155 Fed. 681 (D. Pa. 1907); *Correia v. Santos*, 191 Cal. App. 2d 844, 13 Cal. Rpts. 132 (1961); *Carter v. Sterling Finance Co.*, 132 So. 2d 430 (Fla. App. 1961); *Foley v. Hoffman*, *supra* note 5; *Fitzgerald v. Piette*, 180 Wisc. 625, 193 N.W. 86 (1923).

¹⁴ *Nolan v. Standard Publ. Co.*, 67 Mont. 212, 216 Pac. 571 (1923) (charge that an attorney was a shyster); *Louisville Taxicab and Transfer Co. v. Ingle*, 229 Ky. 518, 17 S.W.2d 709 (1929) (that a chauffeur is a habitual drunkard); *Cobbs v. Chicago Defender*, 308 Ill. App. 55, 31 N.E.2d 323 (1941) (that a clergyman was subject to scandalous rumor); *Cruikshank v. Gorden*, 118 N.Y. 178, 23 N.E. 457 (1890) (that a physician was called a butcher).

¹⁵ *Damscey v. Hollway*, 2 K.B. 441 (1901) (where it was said that an attorney had lost thousands of dollars); *Lumby v. Allday*, 148 Eng. Rep. 1434 (1831) (where it was said the company clerk consorted with prostitutes); *Liebel v. Montgomery Ward & Co.*, 103 Mont. 370, 62 P.2d 667 (1936) (where it was charged that a stenographer did not pay her bills); *Vinson v. O'Malley*, 25 Ariz. 552, 220 Pac. 393 (1923) (where it was charged that a physician had committed adultery); *Gurtler v. Union Parts Mfg. Co.*, 285 App. Div. 643, 140 N.Y.S.2d 254 (1955) (where it was charged that an engineer was a communist).

chastity to a female. Males are excluded because the injury to reputation is presumed not as great. It should be noted that at common law such an exception did not exist, but has been included within this category by statutory enactment,¹⁶ or by an understanding of the statement as not mere unchastity, but a charge of fornication or adultery,¹⁷ both of which are criminal acts involving infamous punishment or moral turpitude.

To reiterate then, if a statement merely contains libelous matter upon the showing of extrinsic facts, but such matter fails to qualify for one of the above mentioned categories, the party claiming such will not succeed in recovering unless there is included allegation and proof of special damages.

Assuming the plaintiff has the necessary requirements for a prima facie case, the next point of interest is the method by which the defendant may defeat liability for his alleged defamatory remarks.

The defenses to civil libel, with which we are more concerned, include those of truth and privilege. Because of the relatively recent importance placed upon the area of "privilege" in the law of libel, a more detailed and analytical study will be made on this subject than on the defense of truth.

Generally, in all jurisdictions there exists a truth defense, qualified in some states, including Illinois, with the requirement that the matter must be published ". . . with good motives and for justifiable ends . . ."¹⁸

The first Illinois constitution¹⁹ did not impose such a restriction on the truth defense in civil actions, but in 1869, the Illinois constitutional provision was amended to its present form, requiring good motives and justifiable ends.²⁰ Not until 1911 was this question considered by the Illinois

¹⁶ *Smith v. Gafford* 31 Ala. 45 (1857); *Pink v. Catanich*, 51 Cal. 420 (1876); *Richter v. Stolze*, 158 Mich. 594, 123 N.W. 13 (1909); *Vanloon v. Vanloon*, 159 Mo. App. 255, 140 S.W. 631 (1911).

¹⁷ *Reitan v. Goebel*, 33 Minn. 151, 122 N.W. 291 (1885); *Davis v. Sladden*, 17 Ore. 259, 21 Pac. 140 (1889); *Kelley v. Flaherty*, 16 R.I. 234, 14 Atl. 867 (1888); *Zeliff v. Jennings*, 61 Tex. 458 (1884). Recent decisions have simply recognized the rule without discussion: *Hallman v. Brody*, 16 Alaska 308, 233 F.2d 877 (1956); *Biggerstaff v. Zimmerman*, 108 Colo. 194, 114 P.2d 1098 (1941); *Cushing v. Hederman*, 117 Iowa 637, 91 N.W. 940 (1902); *Cooper v. Seaverns*, 81 Kan. 267, 105 Pac. 509 (1909); *Battles v. Tyson*, 77 Neb. 563, 110 N.W. 299 (1906); *Gnapinsky v. Goldyn*, 23 N.J. 243, 128 A.2d 697 (1957).

¹⁸ ILL. CONST. art. II, § 4. However, the English rule held truth to be a complete defense to such an action, as do the majority of states. See generally TOWNSEND, *SLANDER AND LIBEL* (4th ed. 1890); Ray, *Truth: A Defense To a Libel*, 16 MINN. L. REV. 43 (1931); Harnett and Thornton, *The Truth Hurts: A Critique of a Defense to Defamation*, 35 VA. L. REV. 425 (1949); RESTATEMENT, TORTS § 582 (1938).

¹⁹ ILL. CONST. art. II, § 4 (1818).

²⁰ See 2 DEBATES OF THE ILLINOIS CONSTITUTIONAL CONVENTION 177 (1870): After the proposed change of section 4 was read, one delegate, Mr. Bromwell, remarked: "It

courts, and in the decisions that followed, the courts never directly treated the issue.²¹ In 1919, the Illinois Supreme Court, in the case of *Ogren v. Rockford Star Printing Co.*,²² conclusively held that truth alone was not a defense, but must be coupled with good motives and justifiable ends. Nonetheless, great confusion has resulted, because the Illinois courts have not expressly construed the substantive meaning of the truth defense.

Furthermore, in jurisdictions holding that truth alone, or truth coupled with good motives and justifiable ends, constitutes an adequate defense, the literal truth need not be shown. It has been held that a showing of substantial, and not literal, truth affords sufficient grounds for defense.

The second defense to libel is that of privilege, both absolute and qualified. The former applies when society values the communication as highly important, whereas the latter applies when the public policy is of lesser importance.

The first classification of the absolute privilege has been generally designated judicial proceedings.²³ Included within this are defamations by judges, jurors, litigants, counsel, and statements made in judicial opinions.²⁴ However, except with respect to judges and jurors, it is required that the communications be relevant or pertinent to the proceeding at hand.²⁵

seems to me that the language used here does not express our meaning. . . . Heretofore the law had been that in a civil cause the truth has been sufficient justification, however published."

²¹ *La Monte v. Kent*, 163 Ill. App. 1 (1911); *Szimkus v. Ragauckas*, 189 Ill. App. 407 (1914).

²² 288 Ill. App. 405, 123 N.E. 587 (1919). There are few jurisdictions which maintain the same or similar position as the Illinois courts, those so holding including the following: *Stanley v. Prince*, 118 Me. 360, 108 Atl. 328 (1919); *Briggs v. Brown*, 55 Fla. 417, 46 So. 325 (1908); *Wertz v. Sprecher*, 82 Neb. 834, 118 N.W. 1071 (1908); *Conner v. Standard Pub. Co.*, 183 Mass. 474, 67 N.E. 596 (1903); *Buckhart v. North American Co.*, 214 Pa. 39, 63 Atl. 410 (1906); *Star Publishing Co. v. Donahoe*, 58 Atl. 513 (Del. 1904); *Hutchins v. Page*, 75 N.H. 215, 72 Atl. 689 (1909).

²³ The term judicial proceeding has been held to include any hearing before a tribunal performing a judicial function, *ex parte* or not: *Gunter v. Reeves*, 198 Miss. 31, 21 So.2d 468 (1945); *Mezullo v. Maletz*, 331 Mass. 233, 118 NE.2d 356 (1954) (lunacy hearing); *Abrams v. Crompton-Richmond Co.*, 5 App. Div. 2d 811, 170 N.Y.S.2d 981 (1958) (bankruptcy); *Nickovich v. Mallart*, 51 Nev. 306, 274 Pac. 809 (1929) (naturalization); *Penick v. Ratcliffe*, 149 Va. 618, 140 S.E. 664 (1927) (election contests).

²⁴ *Sidener v. Russel*, 34 Ill. App. 446 (1889); *Massey v. Jones*, 182 Va. 200, 28 S.E.2d 623 (1944); *Waldo v. Morrison*, 220 La. 1006; 58 So.2d 210 (1952); *Cotonio v. Guglielmo*, 176 La. 421, 146 So. 11 (1933).

²⁵ In *Scott v. Statesville Plywood and Veneer Co.*, 240 N.C. 73, 76, 81 S.E.2d 146, 149 (1954), the court intimated the liberality of the "relevance": ". . . the matter to which the privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety."

The scope of the absolute privilege also incorporates communications made by executive officers of the federal government.²⁶ In the past, the courts have restricted the application of this immunity to those within the higher echelons of the government. In *Barr v. Matteo*,²⁷ however, the United States Supreme Court held that the privilege extends to all federal personnel. But the protection was held to attach only to those communications made "within the outer perimeter" of their line of duty. The main reason underlying the Court's extension of the doctrine was that the qualified privilege would have resulted in a restriction upon the functioning of such officers. Under such a limited scope of protection, the officer might possibly be subjected to numerous libel suits, demanding use of his time for refutation, and subjecting his official conduct to the unreliable judgment of a jury.

The courts have also concluded that actions for defamatory statements made in legislative proceedings would jeopardize the procedural system which is necessary to accomplish the legislative business, and have therefore allowed an absolute privilege for statements made in such proceedings. This privilege has not been hampered by limitations of relevancy. In fact, many state constitutions provide that the privilege extends to anything said in the course of the legislative proceedings. For example, the Illinois Constitution, article IV, section 14 states:

Senators and Representatives shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during the session of the General Assembly, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.²⁸

²⁶ *Spalding v. Vilas*, 161 U.S. 438 (1896), involving the Postmaster General; *Pearson v. Wright*, 156 F. Supp. 136, (D.D.C. 1957), the chairman of a federal commission; *Lyons v. Howard*, 250 F.2d 912 (1st Cir., 1958), a naval officer.

²⁷ 360 U.S. 564 (1959). For a fuller discussion of the absolute privilege of executive communications, see: Handler & Klein, *The Defense of Privilege in Defamation Suits against Government Executive Officials*, 74 HARV. L. REV. 44 (1960); Gray, *Private Wrongs of Public Servants*, 47 CAL. L. REV. 303 (1959); Note, 69 HARV. L. REV. 875 (1956).

²⁸ ILL. CONST. art. IV. § 14 (emphasis added). The same provision is found in many state constitutions and in the federal constitution (U.S. CONST. art. I, § 6, clause 1). For the English origin of this privilege, see Veeder, *Absolute Immunity in Defamation*, 10 COLUM. L. REV. 131 (1910). Some 36 jurisdictions have the same or similar provision in their state constitutions. This privilege has been held to include statements in the Congressional record: *Methodist Federation for Social Action v. Eastland*, 141 F.Supp. 729 (D.D.C. 1956). However, this immunity ceases upon republication of the same outside of the legislature: *McGovern v. Martz*, 182 F.Supp. 343 (D.D.C. 1960). There has been a division of authority as to whether the absolute privilege envisions statements made by state legislatures and inferior municipal bodies. The majority of courts and the RESTATEMENT, TORTS § 590 (1938), deny such a privilege. However, there is authority that the Illinois courts include within the scope of the absolute privilege legislative proceedings of federal, state or municipal origin. See *Larson v. Doner*, 32 Ill. App. 2d 471, 178 N.E.2d 399 (1961).

When matter contains a defamatory effect, and there is an intermediate degree of importance therein related to public interest, the law has recognized such statements to be qualifiedly, conditionally, or defeasibly privileged. The extent of this privilege is far-reaching, and includes statements made for the interest of others, for the interest of the publisher, or where there is a common interest, *i.e.*, both the procurer and the recipient have an interest in the communication. The protection also extends to reports of public proceedings, fair comment on matters of public concern, and communications to one who may act in the public interest.

The privilege involving interest of others arises when some definite legal relationship exists between the publisher and the person on whose behalf the matter was published.²⁹ It is evident, therefore, that the defendant-publisher cannot be a mere officious intermeddler, but rather must base his intervention upon some legal, moral, or social duty. An example of this would be that an attorney could speak out in the interest of his client.

Another problem arises in relation to the procurement of the information. Some courts refuse to grant the privilege where the information is volunteered, while other courts follow opposite reasoning. The better position appears to be that the method of procurement should be one of the factors to be considered regarding the importance of the interest sought to be protected.

When matter has been published because of the interest of the publisher, some writers have compared liability to self-defense, in that the privilege arises to communicate defamatory media for the protection of one's interests, that is, that which is reasonably necessary to defend his reputation against him who utters the defamation. But if this publication has been excessive or published for some improper motive, or the publication is not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged, or there is a lack of reasonable grounds for belief in the truth of the defamatory matter, then the privilege has been "abused" and there is no protection.³⁰

The third classification of the qualified privileges occurs where the defendant has an interest in the subject matter of the communication and the person to whom it is related has a corresponding interest or a relevant duty. This privilege has included those communications among persons having business dealings, and members of a group wherein there exists a common pecuniary interest. Moreover, the scope of the protection

²⁹ *Toogood v. Spyring*, 1 C.M.&R. 181, 193, 149 Eng. Rep. 1044, 1049-50 (Ex. 1834), wherein the court maintained such a privilege exists when it is "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned."

³⁰ See RESTATEMENT, TORTS, §§ 600-605 (1938); Wettach, *Recent Developments in Newspaper Libel*, 13 MINN. L. REV. 21 (1928).

applies to members of groups with a non-pecuniary relation, among which the more common relationships are religious, social, educational, fraternal, political, professional, and economic in nature.³¹

When one communicates the reports of public proceedings, no matter the extent to which the matter may be defamatory, it is privileged, based on the theory that any member of the public might, if he were present, see and hear for himself. In effect, the party publishing the report is merely the substitute for the public eye. This privilege encompasses all proceedings that are public, including investigations of committees, meetings of municipal councils, acts of executive and administrative officials of all levels of government, and all legislative proceedings.³²

In the area of public interest, there is well-reasoned authority to divide this section into two privileges, namely, the public interest privilege, and the privilege of fair comment on matters of public concern. The former involves communications broad as to content (including misstatements of fact) but limited regarding those to whom it may be communicated. It may be communicated to those who may be expected to act for the benefit of the complainant on some matter involving the interest of the public. Included among these are communications by private citizens to proper authorities for the prevention of crime or, for example, complaints made by members of the public to school board members in relation to a teacher's competency. Of equal importance are communications between public officials. Where not held to be absolutely privileged, they may, if the facts allow, meet the standards of the "public interest" privilege, of which the most important is good faith.³³

The counterpart of the public interest privilege can be termed fair comment on matters of public concern. This privilege grants immunity "to those matters which are of legitimate concern to the community as a whole because they materially affect the interests of all the community."³⁴ Fair comment, as the name implies, encompasses comment, not fact, on all matters of public concern, of which the essential requirements are

(1) that the publication is an opinion; (2) that it relates not to an individual but to his acts; (3) that it is fair; namely, that the reader can see the factual

³¹ For example, *Slocinski v. Radwan*, 83 N.H. 501, 144 Atl. 787 (1929), wherein members of a church discussed the morals of their minister; *Raininger v. Prickett*, 192 Okla. 486, 137 P.2d 595 (1943), involving discussion of proposed new member in a fraternal order. See also, Green, *Relational Interests*, 30 ILL. L. REV. 314 (1935).

³² *Cresson v. Louisville Courier Journal*, 299 Fed. 487 (6th Cir. 1924); *Swede v. Passaic Daily News*, 30 N.J. 320, 153 A.2d 36 (1959); *Brandon v. Gazette Publishing Co.*, 234 Ark. 332, 352 S.W.2d 92 (1961). See Barnett, *The Privilege of Defamation by Private Report of Public Official Proceedings*, 31 ORE. L. REV. 185 (1952).

³³ *Bingham v. Gaynor*, 203 N.Y. 27, 96 N.E. 84 (1911).

³⁴ PROSSER, *TORTS* 812 (3rd ed. 1964).

basis of the comment and draw his own conclusion; and (4) that the publication relates to a matter of public interest.³⁵

Furthermore, attention must be given to the fact that in the area of public officials a minority of jurisdictions maintain that the qualified immunity of "fair comment" includes within its scope misstatements of fact. Under the rule, one need not have the accurate factual basis for the comment thereon, but rather can draw comment from misstated facts and remain immune from suit.³⁶ However, the majority of courts have refused to adopt the liberal application espoused by the minority position, and have steadfastly demanded correct statements of facts as the just and primary requisite of the fair comment privilege, even as applied to public officials.³⁷

³⁵ *Brewer v. Hearst Publishing Co.*, 185 F.2d 846, 848. (7th Cir. 1950).

³⁶ The leading case in support of the minority position is *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281 (1908), in which the court stated the conditions necessary for the rule to operate, namely absence of malice, reasonable grounds to believe, and a publication which is not excessive in view of the purpose of the article. In agreement with the *Coleman* decision are approximately eleven states: *Snively v. Record Pub. Co.*, 185 Cal. 565, 198 Pac. 1 (1921); *Charles Parker Co. v. Silver City Crystal Co.*, 142 Conn. 605, 116 A.2d 440 (1955); *Pearce v. Brower*, 72 Ga. 243 (1884); *Salinger v. Cowles*, 195 Iowa 873, 191 N.W. 167 (1922); *Stenson v. Wallace*, 144 Kan. 730, 62 P.2d 907 (1936); *Clancy v. Daily News Corp.*, 202 Minn. 1, 277 N.W. 264 (1938); *Lafferty v. Houlihan*, 81 N.H. 67, 121 A. 92 (1923); *Alexander v. Vann*, 180 N.C. 187, 104 S.E. 360 (1920); *Jackson v. Pittsburgh Times*, 152 Pa. 406, 25 Atl. 613 (1893); *Boucher v. Clark Publishing Co.*, 14 S.D.72. 84 N.W. 237 (1900); *Williams v. Standard Examiner Publishing Co.*, 83 Utah 31, 27 P.2d 1 (1933); *Posnett v. Marble*, 62 Vt. 481, 20 Atl. 813 (1889).

³⁷ Under the majority view, a false assertion of fact, even in the absence of malice, of and concerning one in public life, is as actionable as would be such a statement concerning one in private life. The states supporting this view are *Parsons v. Age-Herald Pub. Co.*, 181 Ala. 439, 61 So. 345 (1913); *Arizona Pub. Co. v. Harris*, 20 Ariz. 446, 181 Pac. 373 (1919); *Star Pub. Co. v. Donahoe*, 58 Atl. 513 (Del. 1904); *Washington Times v. Bonner*, 86 F.2d 836 (D.C. Cir. 1936); *Kirkland v. Constitution Pub. Co.*, 38 Ga. App. 632, 144 S.E. 821 (1928); *Democrat Pub. Co. v. Harvey*, 181 Ky. 730, 205 S.W. 908 (1918); *Levert v. Daily States Pub. Co.*, 123 La. 594, 49 So. 206 (1909); *Powers v. Cary*, 64 Me. 9 (1874); *A. S. Abell Co. v. Kirby*, 227 Md. 267, 176 A.2d 340 (1961); *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N.E. 1 (1891); *Foster v. Scripps*, 39 Mich. 376, 33 Am. Rep. 403 (1878); *Oakes v. State*, 98 Miss. 80, 54 So. 79 (1910); *Merriam v. Star-Chronicle Pub. Co.*, 335 Mo. 937, 74 S.W.2d 592 (1934); *Estelle v. Daily News Pub. Co.*, 99 Neb. 397, 156 N.W. 645 (1916); *Lindsey v. Evening Journal Association*, 10 N.J. Mis. R. 1275, 163 Atl. 245 (1932); *Mencher v. Chesley*, 297 N.Y. 94, 75 N.E.2d 257 (1947); *Murphy v. Farmers Educational & Coop. Union*, 75 N.W.2d 636 (N.D. 1955); *Westropp v. E. W. Scripps Co.*, 148 Ohio St. 365, 74 N.E.2d 340 (1947); *Oklahoma Pub. Co. v. Kendall*, 96 Okla. 194, 221 Pac. 762 (1923); *Marr v. Putnam*, 196 Ore. 1, 246 P.2d 509 (1952); *Tiepke v. Times Pub. Co.*, 20 R.I. 200, 37 Atl. 1031 (1897); *Jackson v. Record Pub. Co.*, 175 S.C. 211, 178 S.E. 833 (1935); *Fort Worth Press Co. v. Davis*, 96 S.W.2d 416 (Tex. Civ. App. 1936); *Carpenter v. Meredith*, 122 Va. 446, 96 S.E. 635 (1918); *Owens v. Scott Publishing Co.*, 46 Wash. 2d 666, 284 P.2d 296 (1955); *Sweeney v. Baker*, 13 W.Va. 158 (1878); *Lukaszewicz v. Dziadulewicz*, 198 Wis. 605, 225 N.W. 172 (1929).

Illinois also concurs with the majority position. See *Pape v. Time, Inc.*, 318 F.2d 652

Even though an overwhelming number of states have refused to make privileged false assertions of fact, the Supreme Court, in *New York Times v. Sullivan*,³⁸ found it necessary to so rule. The court vindicated the former minority position, establishing it as the national standard obligatory upon all states, when public officials are involved. The basis for the decision is founded upon the constitutional guarantee of freedom of expression in the first amendment. Apparently, the Court desired no misconception of its pronouncement, for as Mr. Justice Brennan stated:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."³⁹

In *New York Times v. Sullivan*, wherein a police commissioner brought suit for an advertisement allegedly defaming him in his official capacity, the Court reversed the Supreme Court of Alabama's damage award of \$500,000. This decision became the first instance in which the Court applied the first amendment to the law of libel,⁴⁰ and held that "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."⁴¹

The first amendment, as interpreted by this Court, is designed to guarantee freedom of expression upon public questions, so as to "assure unfet-

(7th Cir. 1963); *Van Norman v. The Peoria Journal-Star, Inc.*, 31 Ill. App. 2d 314, 175 N.E.2d 805 (1961); *Proesel v. Myers Publishing Company*, 24 Ill. App. 2d 501, 165 N.E. 2d 352 (1960); *Belt v. Tribune Co.*, 6 Ill. App. 2d 489, 128 N.E. 2d 638 (1955); *Cook v. East Shore Newspapers*, 327 Ill. App. 559, 64 N.E. 2d 751 (1945); *Hotz v. Alton Telegraph Printing Co.*, 324 Ill. App. 1, 57 N.E. 2d 137 (1944); *Ogren v. Rockford Star Pub. Co.*, 288 Ill. 405, 123 N.E. 587 (1919); *Cooper v. Lawrence*, 204 Ill. App. 261 (1917); *People v. Fuller*, 238 Ill. 116 (1909).

³⁸ *Supra* note 1.

³⁹ *Id.* at 279-280.

⁴⁰ For example, in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942), the Court stated the following: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words."

The evident change in the Court's thinking is aptly shown by Justice Brennan: "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment" (*supra* note 1 at 269). Other instances where the Court, previous to the *Times* decision, expressed this idea can be seen in the opinions of the following: *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 (1957); *Times Film Corp. v. Chicago*, 365 U.S. 43, 48 (1961); *Roth v. United States*, 354 U.S. 476, 486 (1957); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1950); *Pennekamp v. Florida*, 328 U.S. 331, 348-9 (1946). See also, *Near v. Minnesota*, 283 U.S. 697, 715 (1931), wherein the Court said "the common law rules that subject the libeler to responsibility . . . are not abolished by the protection extended in our constitution."

⁴¹ *Supra* note 1 at 269.

tered interchange of ideas for the bringing about of political and social changes desired by the people."⁴² Applied to the case at hand, the advertisement contained grievances and protests of the people on a public issue, segregation, and thereby qualified for this freedom of expression espoused by the Court. The Court wanted no misconception as to the extent of the protection to be afforded, as is evidenced by Mr. Justice Brennan's language: "... debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."⁴³

The Court then proceeded, in rather apt language, to sweep away the holding of some thirty-six jurisdictions by finding that erroneous statements on debated public issues are inevitable. Therefore, to provide, "breathing space" necessary to express such erroneous statements concerning a public official, that official may only recover an award of damages upon proof that the false statement was generated by "actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."⁴⁴

In reaching this conclusion, the Court, in effect, revitalized the first amendment with historic meaning. The central meaning of the first amendment entails a core of protection for speech necessary for democratic government to function. As Madison often said, the censorial power must rest

⁴² Roth v. United States, *supra* note 40 at 484.

⁴³ *Supra* note 1 at 270.

⁴⁴ *Id.* at 279–280. A great deal of discussion has centered upon what theory of the Constitution was applied to the *Times* case. Justice Brennan, who gave the opinion of the Court, suggests none of the traditional tests, such as the clear and present danger, redeeming social value, or the balancing tests, were utilized in formulating this opinion. But rather, the Court examined history to discern the "central meaning of the first amendment," and arrived at a theory quite similar to that of Dr. Meiklejohn. In fact, at the conclusion of his article in the *Harvard Law Review*, Justice Brennan implies the interpretation of the first amendment espoused by Dr. Meiklejohn has nearly been realized. See: Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). See also, Meiklejohn, *The First Amendment Is an Absolute*, in 1961 SUPREME COURT REVIEW 245 (Kurland ed.). According to Meiklejohn, the activities important to the freedom to vote, and those activities included within the forms of thought and expression that are necessary to exercise "a proper judgment" in casting his ballot are of "governing importance" and for which the first amendment grants unqualified protection. This, in effect, is an absolutist position, but this position is not akin to that "absolutist" position of Justice Black, because according to Meiklejohn the area of private defamation is not so covenanted, but rather it only extends to "... public issues concerning which, under our form of government, he [citizen] has authority, and is assumed to have competence, to judge. Though private libel is subject to legislative control, political or seditious libel is not." (*Id.* at 259.) The difference, then, between these two absolutist positions is a matter of degree, and not of theory. Finally, as Justice Brennan states, the position of Dr. Meiklejohn is finally arriving upon the scene of American constitutional law. The question is, whether Justice Black's position appears so untenable as to warrant such diverse attack?

with the people over the government: "the people, not the government, possess the absolute immunity."⁴⁵ The apparent objective of Mr. Justice Brennan, in quoting the words of Madison, was to establish the foundation of free expression for the citizen critic. In so doing, Mr. Justice Brennan implied that to enforce governmental sanctions upon one expressing criticism of the operative functions of government officials would certainly be *contra* to the inherent meaning of the first amendment. To emphasize the importance of the criticism, Justice Brennan wrote, "It is as much his [the citizen's] duty to criticize as it is the official's duty to administer."⁴⁶ What the Court intended by such language was a direct constitutional attack upon the Alien and Sedition Acts passed by Congress, that is, the Court held that the first amendment expressly forbids such governmental restriction on expression. Since the ruling of the Alabama Court was so akin to such a penalty, the Court held such speech to be within the ambit of protected speech:

Raising as it does the possibility that a good faith critic of government will be penalized, for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression.⁴⁷

The Court found an analogous consideration to support the privilege for the citizen critic of government and its officials, in reference to *Barr v. Mateo*,⁴⁸ wherein the Court held defamatory utterances of federal officials to be absolutely privileged if made "within the outer perimeter" of his duties. This immunity relieves the official of the possible threat of lawsuits so as not to "inhibit the fearless, vigorous, and effective administration of policies of government. . . ."⁴⁹ The court then reasoned that if the official has this privilege, the citizen-critic of government destined to be the purveyor of the operative ability of such administrators must have a similar privilege, for as Justice Brennan reasoned, "[i]t would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."⁵⁰ Concluding that this type of immunity was constitutionally required of the federal and state governments by the first and fourteenth amendments, the Court gave constitutional status to a variant of the fair comment privilege, *i.e.*, misstatements of fact by the citizen-critic in respect to the functions of public officials. Thus, it appears that the *New York Times* decision has adopted the former minority holding. However, this is not the case, because the minority position conditioned

⁴⁵ 4 Annals 934 (1794).

⁴⁸ *Supra* note 27.

⁴⁶ Meiklejohn, *supra* note 44.

⁴⁹ *Supra* note 27 at 571.

⁴⁷ *Id.* at 292.

⁵⁰ *Supra* note 1 at 282-83.

the privilege on the fact that there must be an honest belief in the truth of the statement, whereas the *Times* rule limits the privilege only upon a finding of "actual malice."

"NEW YORK TIMES" APPLIED

Since the *Times* decision, there has been a plethora of comment, both pro and con, with respect to the practicability of the Court's ruling. The main argument against the decision denounces the free reign given to the press, the sole encumbrance being a showing of "actual malice." The Court's advocates foresee the decision as an aid to the commentators who contribute to the rational processes of public opinion and the free flow of information so essential to the democratic way of life. But those who disapprove of the ruling foresee a slackening of responsibility, resulting in unjustified publications of charges and virulent attacks on reputation. Furthermore, the law prior to the *Times* case, at least in the majority of states, had the effect of insuring the authenticity of facts offered for public consideration, or maybe more appropriately, digestion. The opponents of the "actual malice" rule contend that such an unleashing of power to the press will render insecure those interested in public life, in that they would reconsider entering public life upon contemplation of the possibility of unpleasant, unwarranted, and vicious attacks upon their conduct. And finally, they believe that more often than not the social interest placed on individual reputation from unwarranted injury far outweighs the social interest gained from the unrestricted dissemination of information.

In response to the above rationalization, it must be noted that the Court's decision was founded upon freedom of expression. Throughout the years, the Supreme Court has maintained this position, striking down the numerous attempts to restrict the freedom envisioned by the fathers of the Constitution. The importance of this guarantee must not be underestimated. The public, in order to make knowledgeable decisions about their officials, must be exposed to a more fluid, dynamic press, capable of reporting and commenting on those matters caught in the stream of public concern. When too much concern is placed on an individual reputation, the immediate consequence necessarily is the stifling of public discussion and information vital to the efficient operation of an enlightened electorate.

In the end, therefore, one must determine which assumes a more important position upon the democratic scale, the social interest in the unfettered flow of information, or the protection of one's reputation from unwarranted injury. The Court, in deciding, has attempted to strike a balance between these interests by allowing a widespread privilege of communication on the part of the press, subject only to the limitation of "actual malice," which, theoretically, affords protection to the individual's

reputation. Although it appears that the Court did weigh the interests presented, the *Times* ruling was not so decided. Actually, the Court viewed the problem essentially in terms of free press, reasoning that if the press would be liable for misstatements of fact, they "may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."⁵¹

Taking the rule of the *Times* case, it becomes necessary to determine what the Court intended by the words "public official." Of primary importance is the language of the Court itself, and secondly to determine the manner in which lower federal and state courts have interpreted it. To these ends, the following analysis shall be directed.

At first glance, an examination of Justice Brennan's opinion shows that he borrowed a great portion of the reasoning found in *Coleman v. MacLennan*,⁵² part of which Justice Brennan quoted: "It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages."⁵³ The Court in the *New York Times* case also approvingly quoted the jury instruction found in the *Coleman* case: "This privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office."⁵⁴ But in a latter part of the *Times* decision the opinion reads, "[w]e hold today the Constitution delimits a State's power to award damages for libel in actions brought by public officials . . ."⁵⁵ Despite the fact the Court specifically mentions "public officials, and only restricts a state's awarding of damages in such cases, it is of paramount importance that one considers what Justice Brennan said in footnote 23:

⁵¹ Support for this theory can be found in Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUPREME COURT REVIEW 191. In effect, he states the Court reached for the central meaning of the Constitution, and dismissed the so-called "balancing test" in arriving at its decision. Somewhat later Professor Kalven writes: "There is, of course, a sense in which the Court did indulge in balancing. It did not go the whole way and give an absolute privilege to the 'citizen-critic'. It left open, the possibility of liability where the defendant's actions were the result of actual malice . . . Nonetheless, the idea of balancing was eschewed in the *Times* case not only by the majority but by the concurring opinions as well." (*Id.* at 217.)

⁵² *Supra* note 36.

⁵³ *Id.* at 724, 98 Pac. at 286. Furthermore, since the Court relied considerably upon Judge Burch's opinion from the *Coleman* case, the question arises, why did the Court omit mentioning the following excerpt: "It must apply to all officers and agents of government, municipal, state, and national; to the management of all public institutions, educational, charitable, and penal; to the conduct of all corporate enterprises affected with a public interest, transportation, banking, insurance; and to innumerable other subjects involving the public welfare." (*Supra* note 36 at 734-35, 98 Pac. at 289.)

⁵⁴ *Id.* at 723.

⁵⁵ *Supra* note 1 at 283.

We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would not be included. . . . Nor need we here determine the boundaries of the "official conduct" concept.⁵⁶

Because the Court abstained from specifying the exactness of a "public official," numerous federal and state courts have been plagued with the problem of whether or not the plaintiff in a particular libel action falls within the singular concept of "public official." Until the Court itself defines the limits of the concept, other courts become duty-bound to speculate, the result being varied applications of the rule. Justice Black's idea of the extensiveness of the rule, however, is readily ascertainable: "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."⁵⁷

The next case to appear before the Court concerning the standard adopted in the *Times* case was *Garrison v. Louisiana*.⁵⁸ A district attorney criticized certain state court judges for laziness, inefficiency, and hampering his efforts to enforce vice laws. The Court aptly ruled that the Louisiana criminal defamation statute, when considered in relation with the rule of the *Times* case, limits state power to impose criminal sanctions for criticism of the official conduct of public officials. But even here, the Court refused to delineate the boundaries of the "public official," but inferentially expressed first amendment guarantees in relation to "public issues," rather than "public officials."

In *Rosenblatt v. Baer*,⁵⁹ the Court has again considered the problem of the public official. The official in question was employed as the supervisor of the Belknap County Recreation Area, a facility owned and operated by Belknap County. The respondent was directly responsible to the County Commissioners, three elected officials in charge of the county government. Justice Brennan, again speaking for the majority, stated the "public official" rule was necessary for two reasons: first, because there is a strong interest in debate on "public issues"; and second, there is a strong interest in debate about those persons who are in a position to significantly affect the determination of those issues. For these reasons, therefore, matters of grave public concern demand widespread publication to inform the public of the conduct of their officials. This, it is conceded, can only be accomplished by implementation of the public official rule. Justice Brennan continued by pinpointing criticisms of government as the center of free speech, and yet he refrained from stating whether or not governmental criticism occupied an exclusive position. Additional indication of the expansiveness of

⁵⁶ *Id.* at 283, n. 23.

⁵⁸ 379 U.S. 64 (1964).

⁵⁷ *Id.* at 297 (concurring opinion).

⁵⁹ 86 S.Ct. 669 (1966).

the rule appears when he writes "that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."⁶⁰

On the day *Rosenblatt v. Baer* was decided, the Court considered another case involving the "public official" rule.⁶¹ Here, the petitioner was an assistant general manager of Pinkerton's National Detective Agency who brought an action for defamatory statements, by a union and its officers, circulated during a union campaign.⁶² Rather than incorporating petitioner within the ambit of a public official, the Court decided the case solely on grounds of federal pre-emption, to effectuate the statutory purpose of the Taft-Hartley Act.⁶³

Having considered the extent of the decisions of the Supreme Court, one finds that the Court gives little indication, and, in effect appears to have evaded defining exactly who or what is included within this "public official" concept.

In view of the necessity to ascribe some certainty to the scope of the "public official" privilege, it is beneficial to consider the lower federal and state court decision which have interpreted this rule.

⁶⁰ *Id.* at 676. The application of this idea—substantial responsibility of governmental affairs—would seem very inadequate to the case at hand, since it is difficult to imagine a supervisor of a recreation area exercising such control, or having such an influential role in governmental affairs.

In answer to a hypothetical posed to the Court concerning whether or not the rule applied to a night watchman stealing state secrets, the Court stated: "The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." (*Id.* at 676, n. 3.)

⁶¹ *Linn v. United Plant Guard Workers of America, Local 114*, 86 S.Ct. 657 (1966). See also, *Henry v. Collins*, 380 U.S. 356 (1965), wherein the Court held respondents, a county attorney and Chief of Police, to the standard of the "public official" rule of the *Times* case.

⁶² The initial issue decided by the Court was that the National Labor Relations Act, 61 Stat. 136, 29 U.S.C. § 141 (1964) does not bar the maintenance of a common law libel suit by an official of an employer subject to the Act.

⁶³ The Court adapted the public official rule by analogy rather than by constitutional compulsion. The reasoning of the opinion rests in Justice Brennan's words, "not only would the threat of state libel suits dampen the ardor of labor debate, and truncate the free discussion envisioned by the Act, but that such suits might be used as weapons of economic coercion. Moreover, in view of the propensity of jurors to award excessive damages for defamation, the availability of libel actions may pose a threat to the stability of labor unions and smaller employers. In order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy the possibility of such consequences must be minimized. We therefore limit the availability of state remedies for libel to those instances in which the complainant can show the defamatory statements were circulated with malice and caused him damage." (*Supra* note 61 at 664.)

At the outset, it would be wise to mention that some state courts have misconstrued the holding of the Court, whereas other courts seem to have totally ignored the rule, depending on the law of their jurisdiction prior to the *New York Times* case.⁶⁴

The case of *Gilberg v. Goffi*⁶⁵ involved an action for civil libel brought by the law partner of the mayor of Mount Vernon. The statement made was that the mayor's law firm had been practicing law in a city court in matters involving conflicts of interests. The court held that since plaintiff voluntarily became involved in the issue at hand, "plaintiff and the law firm necessarily constituted one and the same juridical person."⁶⁶ A necessary corollary of this decision would be that statements are not actionable when they incidentally or negligently defame another person closely associated with the "public official." This theory was also applied by the court in *Pearson v. Fairbanks Publishing Co.*⁶⁷ A public figure who advocated the cause of a senatorial candidate was held to the rule in the *Times* case. The court said that the columnist, a public figure and internationally-known newspaper and radio columnist, should occupy the same standing in the law as the senatorial candidate whose cause he was publicly supporting.

The court in *Pauling v. News Syndicate Co.*⁶⁸ found the *Times* rule too conservative, and after considering the practical implications of the language of the Supreme Court, stated:

Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; if a newspaper cannot constitutionally be held for defamation when it states without malice, but cannot prove, that an incumbent seeking reelection has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent. Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line. . . .⁶⁹

Other courts, however, are hesitant to magnify the rule beyond the implied limitation of the *Times* case. In *Fignole v. Curtis Publishing Co.*,⁷⁰ the court followed the analogy used by Justice Brennan, in that since plaintiff, a candidate for public office, had no absolute privilege against

⁶⁴ For example, see *Associated Press v. Walker*, 393 S.W.2d 671 (Tex. App. 1965); *Clark v. Allen*, 204 A.2d 42 (Pa. Super. 1964); *Walker v. Savell*, 335 F. 2d 536, (5th Cir. 1964); *H. O. Merren & Co. v. A. H. Belo Corp.*, 228 F. Supp. 515 (N.D. Texas, 1964).

⁶⁵ 21 App. Div. 2d 517, 251 N.Y.S. 2d 823 (1964).

⁶⁶ *Id.* at 527.

⁶⁷ 33 U.S.L. WEEK 2307 (Alaska Super Ct. 1964).

⁶⁸ 335 F.2d 659 (2nd Cir. 1964).

⁶⁹ *Id.* at 671.

⁷⁰ 34 U.S.L. WEEK 2297 (D.C. N.Y. 1965).

liability for libelous statements made in the course of official duties, then there is no just reason to grant such an immunity to his critics. This court, following the logic of the *Barr v. Matteo*⁷¹ case, would thereby refrain from imposing the "actual malice" standard upon a plaintiff who had no corresponding immunity for his own defamatory statements. In effect, the court attempted to establish an equitable arrangement in that the ordinary rules of common-law libel would take effect whenever one of the parties was at a disadvantage in rebutting the accusations so made.⁷²

The case of *Walker v. Courier-Journal and Louisville Times Company, Inc.*⁷³ appears to be the only case in which the court has come to grips with the ambiguousness of the "public official" rule. The plaintiff, retired

⁷¹ *Supra* note 27.

⁷² The majority of the courts dealing with the problem of the "public official" have, for the most part, restrained application of the rule to those elected or appointed officials of government: federal, state, and municipal. See: *Proessell v. Myers*, 48 Ill. App. 2d 402, 199 N.E.2d 73 (1964), wherein the court properly extended the rule to the president of a village; *Matassa v. Bell*, 246 La. 294, 164 So. 2d 332 (1964), wherein a constable running for re-election was held to the rule; *Kennedy v. Mid-Continent Telecasting, Inc.*, 193 Kan. 544, 394 P.2d 400 (1964), wherein a county commissioner was a "public official"; *Fegley v. Morthimer*, 204 Pa. Super. 54, 202 A.2d 125 (1964), wherein members of school board and chairman of its planning committee were held to be within the rule; *State v. Browne*, 86 N.J. Super. 217, 206 A.2d 591 (App. Div. 1965), involving a candidate for public office. Note the difference in reasoning between the court in *State v. Browne* and the opinion in *Figrole v. Curtis Publishing Co.*, *supra* note 46. The court, in *Pape v. Time, Inc.*, 354 F.2d 558 (7th Cir. 1965), noted the extension of the rule made by the Supreme Court in *Henry v. Collins*, *supra* note 37, to a Chief of Police, and held the *Times* case likewise applies to appointed as well as elected officials. Also, in *Wade v. Sterling Gazette Co.*, 56 Ill. App. 2d 101, 205 N.E. 2d 144 (1960), the court held a candidate for the office of mayor could only recover damages upon a finding the statements were made maliciously.

Some courts take a very limited view of the "public official" rule. See: *Spahn v. Julian Messner, Inc.*, 43 Misc. 2d 219, 250 N.Y.S.2d 529 (1964), involving the famed sports figure. The court held that the privilege established in the *Times* case was not absolute and unconditional, but that it was conditioned on a finding of "actual malice," and was applicable only to those classes of "public officials" not public figures; *Dempsey v. Time, Inc.*, 43 Misc. 2d 754, 252 N.Y.S. 2d 186 (1964), involving accusations that Dempsey used "loaded" gloves to win the heavyweight championship some forty-five years ago. Dempsey was a public figure, but the court refused to extend the ruling of the *Times* case to such a class. See also, *Faulk v. Aware, Inc.*, 14 N.Y. 2d 954, 253 N.Y.S.2d 990, 202 N.E. 2d 372 (1964), *cert. denied*, 380 U.S. 916 (1965), wherein the court denied applicability of the rule to a radio and television personality; *Harper v. National Review, Inc.*, 33 U.S.L. WEEK 2341 (N.Y. Super. 1964), involving an individual in a public debate; *Clark v. Pearson*, 34 U.S.L. WEEK 2338 (D.C. D.C., 1965), wherein the court refused to find a lobbyist involved in public affairs within the "public official" doctrine.

⁷³ 246 F. Supp. 231 (D.Ky. 1965). However, the principal issue of the case concerned the defendant's reliance on press association reports of plaintiff's conduct at Oxford, Mississippi. The court found such reliance did not constitute such reckless disregard of facts or knowledge of falsity as is constitutionally required to support recovery in such an action.

General Walker, was involved in the rioting on the campus of the University of Mississippi. General Walker charged that defendant published reports libelling the honor, character, and reputation of his person.⁷⁴ The opinion began by centering its reasoning upon language found in the *Times* case, which alluded to extending the privilege to all matters of public concern, public men, and candidates for office.⁷⁵ Secondly, the court refers to footnote 23⁷⁶ of the *Times* opinion, and surmises:

From this language I believe . . . that the broad constitutional protections afford . . . will not be limited to "public officials" only, for to have any meaning the protection must be extended to other categories of individuals or persons involved in the area of public debate or who have become involved in matters of public concern.⁷⁷

Otherwise, as the court points out, there is no reason for the insertion of footnote 23. Furthermore, a second reading of footnote 23 will reveal that the Court departed from the traditional custom of deciding cases on the narrowest constitutional grounds. Judge Gordon finds this fact to have "special significance to the broad language adopted in arriving at its decision . . ."⁷⁸ In summation, the court finds the concept "public man" and not "public official" as an inescapable result of a thorough reading of the *Times* case; and regarding the limits of the "public man" concept, the court eloquently states

If any person seeks the 'spotlight' of the stage of public prominence then he must be prepared to accept the errors of the searching beams of the glow thereof, for only in such rays can the public know what role he plays on the stage of public concern—often, regretfully, a stage torn in the turmoil of riot

⁷⁴ The charge contained statements to the effect that plaintiff had led a group of rioters, seemingly because of his military background, against the U. S. Marshals on the scene, coupled with statements impugning the reputation of the General for his part taken in the riots.

⁷⁵ *Supra* note 36.

⁷⁶ *Supra* note 55. In footnote 23 of the *Times* opinion, Justice Brennan expressed that the Court would refrain from specifying or delineating the categories of those persons who come within the "public official" rule.

⁷⁷ *Supra* note 73 at 233.

⁷⁸ *Ibid.* The Court, in the *Times* decision, had many alternatives upon which to settle the case, instead of wording the decision in such sweeping terms; for example, that the publication was not of and concerning plaintiff, as is remarked by Justice Brennan: "... the evidence was constitutionally defective . . . it was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' respondents" (*supra* note 1 at 288). Moreover, from an examination of the case, it is evident additional grounds such as jurisdiction, or procedural due process could have aptly resolved the case. However, the Court realized the necessity of departing from the traditional narrowest basis notion, for such a handling would have deprived the Court of the salutary gains of restraint otherwise accomplished. For a discussion in great depth of these alternative methods open to the Court, see Note, 60 NW. L. REV. 95 (1965).

and civil disorder, whereon error in reported occurrence is more apt to become the rule rather than the exception.⁷⁹

The latest pronouncement by the courts of New York upon the extensiveness of the "public official" rule is found in *Gilligan v. King*.⁸⁰ The plaintiff, a police lieutenant in the New York City Police Department, shot and killed a Negro youth who allegedly threatened plaintiff with a knife. The defendants caused posters to be circulated which bore a picture of plaintiff, in a police uniform, and were entitled "Wanted for Murder." The court ruled the case must be decided within the scope of the *Times* ruling, and thereby held plaintiff to the "public official" standard. In arriving at such a conclusion, the court recognized that past decisions have shown a liberality in extending the doctrine to persons not occupying public office, in fact even so far as to "embrace all persons in the public arena."⁸¹ However, confronted with an excellent argument by counsel for plaintiff, the court diverted from discussion of "public officials," and instead interpreted the *Times* decision as encompassing all debate on public issues designed to bring about "political and social changes desired by the people."⁸² In conclusion, the court stated that in matters of public interest which raise public questions, the ruling of the *Times* case is appropriate; and the discussion of the conduct of a person involved within a central public issue cannot be found actionable unless there is proof of "actual malice" generated by erroneous statements of fact.

In summation, it can be readily seen that the doctrine of the "public official" enunciated in the *Times* case has successfully encompassed defamations involving matters of public concern or, to borrow one court's interpretation, anyone who seeks "the spotlight . . . of public prominence." The question remains, whether or not the Supreme Court envisioned such expansion of the rule. The reluctance of the Court, in the *Times* case and the few decisions subsequent thereto, to impose any limitation upon the application of the rule, seems somewhat determinative of the thinking of the Court. It should be noted that the extreme liberality to which some courts have leaned in finding a basis for their decision evidently derives from the effort of the Supreme Court to eliminate the scars of decades of segregation in this nation. It is to this end that the "public official" is directed. This is "one of the major public issues of our times," as Justice Brennan said, and it "would seem clearly to qualify for the constitutional protection."⁸³ In fact, the lower federal state court decisions that appar-

⁷⁹ *Supra* note 1 at 234. ⁸⁰ 246 N.Y.S.2d 309 (Sup. Ct. 1965). ⁸¹ *Id.* at 313.

⁸² The "social change" desired to be wrought by such villification of plaintiff was the denial of the right of off-duty policemen to carry guns, and the establishment of a civilian review board to bear citizen's complaints.

⁸³ *Supra* note 1 at 271.

ently divert from the bulk of the decisions strictly interpreting the *Times* ruling, have done so in cases involving the issue of segregation,⁸⁴ in some form or another. It is to this end that the rule should be directed, to open debate on the most acute public issue of the time, the equality of man. "To many this is, and always will be, folly; but we have staked upon it our all."⁸⁵

CONCLUSION

The final point of discussion concerns the ramifications of this rule:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.⁸⁶

The application of this federal rule is mandatory in all actions maintained by a "public official," whatever that term includes, and prohibits a state from awarding damages for libel against the "citizen-critic" of the "public official." Secondly, the Illinois Constitution of 1870, at article II, section 4, permits recovery for libel, both civil and criminal, unless the matter published was true, and was published with good motives and for justifiable ends. The *Times* case established that falsehoods coupled with malice, actual and not implied, remain the only grounds upon which a "public official" may recover. The Illinois constitutional requirement of truth, therefore, is now inapplicable. Furthermore, as pointed out by Justice Brennan,⁸⁷

⁸⁴ Of interest is the concurring opinion of Justice Black in which he finds in such cases the critics should have an absolute right to criticize the conduct of public officials, because "One of the acute and highly emotional issues in this country arises out of the efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places . . ." (*supra* note 1 at 294). In disapproving the "stopgap measures" of the majority, Justice Black clearly espouses his absolutist position: "We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and the press free to criticize officials and discuss public affairs with impunity." (*Id.* at 296.) In Justice Goldberg's concurring opinion, we again find dissatisfaction with the temperance of the majority: "the theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be banned from speaking or publishing because those in control of government think that which is said or written is unwise, unfair, false, or malicious." (*Id.* at 299.) It should be noted that the Supreme Court now recognizes a conditional privilege to defame on matters involving public officials, yet it remains conjectural whether or not the Court will eventually enact an absolute privilege on all matters of public concern; the states courts, for the most part, have acted quite vigorously.

⁸⁵ *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

⁸⁶ *Supra* note 1 at 279-80.

⁸⁷ In *Garrison v. Louisiana*, *supra* note 57, the Court was confronted with a criminal libel action brought by a "public official." It should be mentioned the Court

the interest of the public is greater than that of private reputation, so if the matter is true, it may be inspired even by malice, for the Constitution protects one in the dissemination of truth. Thirdly, assuming the matter published is motivated by an intent to inflict harm, the motive is inconsequential as such, but yet if there is an intent to inflict harm through the use of a falsehood, or a deliberate lie, here the protection of the Constitution ceases, and liability attaches.

Therefore, it must be said that article II, section 4 of the Illinois Constitution loses significance where litigation has been commenced by a "public official." First, if the matter published is true, the Supreme Court stated that the reasons or motives inspiring the communication are of no consequence, for truth, in matters of public concern, is an absolute defense. Secondly, since freedom of expression on public affairs "is the essence of self-government," the only matter in which one can be held liable, even under the jurisdiction of the Illinois courts, would be upon a finding of a defamatory misstatement of fact published with "actual malice." If the matter is false, but contains no showing of "actual malice," or is a true statement yet instigated by the most scurrilous of motives, the defendant is exonerated of any damage award.

The problem engendered by the Court's ruling in the *Times* case will require substantial litigation to solve, in that the solution remains with the Court to determine the boundaries of the rule, and until the Court takes such action, the state courts shall select their position somewhere between police commissioners and public concern, and label that person or thing qualified for the privilege of the *Times* case. Because of the perplexity, and the national importance of such a resolution, the decision lies with the Supreme Court, and yet, as one may readily determine, the day will be long in coming when the Court, in such a question as presented here, will delineate or infringe its scope of protection of the most coveted right: freedom of expression. For this reason alone, the Illinois Constitution should not be revised to accommodate the *Times* doctrine as to the immunity of the "public official" critic.

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eschewed the requirements of "good motives and for justifiable ends" in actions involving such officials or public issues, and incorporating the standards of the *Times* case to these facts, the elusive standards for the obviation of criminal libel in those stated areas will undergo the same metamorphosis as that experienced by civil libel in relation to "public officials."